(1)

Supreme Court, U.S.
FILED

96 369 JUL 3 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RETIRED CHICAGO POLICE ASSOCIATION,
Petitioner,

v.

CITY OF CHICAGO, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CLINTON A. KRISLOV
Counsel of Record
ROBERT J. STEIN III
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 2120
Chicago, Illinois 60601
(312) 606-0500
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

1165 PH

QUESTION PRESENTED

Whether the second prong—germaneness of the litigation to the organization's purpose—of the test for associational standing under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) is, as determined by the D.C. Circuit, an "undemanding" test, requiring only "mere pertinence between litigation subject and [the association's] organizational purpose," *Humane Society v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988), or, as adopted by the Seventh Circuit below, a rigorous test requiring the association to affirmatively prove the validity of its decision to litigate, such that, at the motion to dismiss stage it requires affirmative evidence beyond the association's officer's uncontested testimony that the litigation was authorized.

LIST OF PARTIES

The Retired Chicago Police Association, The City of Chicago, Richard M. Daley in his capacity as Mayor of Chicago, Miriam Santos in her capacity as Treasurer of Chicago, Walter Knorr in his capacity as Comptroller of Chicago, The Policemen's Annuity & Benefit Fund of Chicago, The Firemen's' Annuity & Benefit Fund of Chicago, Municipal Officers' and Employees' Annuity & Benefit Fund of Chicago, Laborer's Annuity & Benefit Fund of Chicago, Coalition of Active Retired Employees Political Action Committee, its officers William J. Danaher and Arthur T. Cholly, Thomas J. Ahlfeld, Ignazio Bontempo, Patrick J. Boyle, Donald M. Jacobson, Michael Monaghan, Arthur Papineau, Lawrence Thomas, Robert Valleyfield, and Stanley C. Lis, William L. Tlapa.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	9

APPENDIX

	App. Page
Opinion of the United States Court of Appeals for the Seventh Circuit, filed February 13, 1996 ..	1
Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, filed April 28, 1994	28
Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, filed June 2, 1994	43
Opinion of the United States Court of Appeals for the Seventh Circuit, filed October 12, 1993 ...	50
Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, filed March 23, 1992	104
Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, filed June 5, 1990	136
Order of the United States Court of Appeals for the Seventh Circuit, filed April 4, 1996, denying petition for rehearing	147

TABLE OF AUTHORITIES

Cases:	PAGE(S)
Albuquerque Indian Rights v. Lujan, 930 F.2d 49 (D.C. Cir. 1991)	6
Associated General Contractors of Connecticut v. City of New Haven, 130 F.R.D. 4 (D. Conn. 1990)	7
Associated General Contractors v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979)	7
Automobile Workers v. Brock, 477 U.S. 274 (1986)	6
Center for Auto Safety v. Thomas, 847 F.2d 843 (D.C. Cir. 1988) (*en banc decision*)	7
Competitive Enterprise Inst. v. National Highway Traffic Safety Administration, 901 F.2d 107 (D.C. Cir. 1990)	6
Freedom Republicans, Inc. v. Federal Elections Commission, 788 F.Supp. 600 (D.D.C. 1992)	7
Hospital Council of Western Pennsylvania v. City of Pittsburgh, 949 F.2d 83 (3d Cir. 1991)	7
Hotel and Rest. Employees Union v. Smith, 846 F.2d 1499 (D.C. Cir. 1988)	6, 7
Humane Society v. Hodel, 840 F.2d 45 (D.C. Cir. 1988)	i, 6
Hunt v. Washington State Apple Adv. Comm'n, 432 U.S. 333 (1977)	i, 4
McKinney v. United States Dept. of Treasury, 799 F.2d 1544 (Fed. Cir. 1986)	7
Minnesota Federation of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989)	7

Mountain States Legal Foundation v. Dole, 655 F.Supp 1424 (D. Utah 1987) 7

NAACP v. Alabama, 357 U.S. 449 (1958) 6, 8

National Association of Psychiatric Treatment Centers for Children v. Mendez, 857 F.Supp 85 (D.D.C. 1994) 7

Retired Chicago Police Association v. City of Chicago, 7 F.3d 584 (7th Cir. 1993) 1

Retired Chicago Police Association v. City of Chicago, 76 F.3d 856 (7th Cir. 1996) ..... *passim*

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S.Ct. 1529 (May 13, 1996) 6

Warth v. Seldin, 422 U.S. 490 (1975) 6

Washington Legal Foundation v. Kessler, 880 F. Supp. 26 (D.D.C. 1995) 7

Constitutional Provisions:

U.S. Const. art. III, § 2, cl. 1 3

Statutes:

28 U.S.C. § 1254 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 1367 2

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Retired Chicago Police Association, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-titled proceeding on February 13, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on which petitioner prays for certiorari, is reported at 76 F.3d 856 (*"RCPA II"*), and is reprinted in the appendix hereto at App. 1-27.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Conlon, J.) dismissing the Retired Chicago Police Association, is not reported, and is reprinted in the appendix hereto at App. 28-42.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Conlon, J.) denying reconsideration of the dismissal is not reported, and is reprinted in the appendix hereto at App. 43-49.

The Opinion of the United States Court of Appeals for the Seventh Circuit, reversing the District Court's first dismissal of the Retired Chicago Police Association for lack of associational standing is reported at 7 F.3d 584 (7th Cir. 1993) (*"RCPA I"*) and reprinted in the appendix hereto at App. 50-103.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Divi-

sion (Conlon, J.) dismissing the Retired Chicago Police Association for lack of associational standing (filed March 23, 1992 and reversed in relevant part by *RCPA I*) is reported at 141 F.R.D. 477, and is reprinted in the appendix hereto at App. 104-135.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Conlon, J.), filed June 5, 1990, holding that the Retired Chicago Police Association had associational standing and denying the motion to dismiss is not reported and is reprinted in the appendix hereto at App. 136-146.

The Order of the United States Court of Appeals for the Seventh Circuit denying rehearing of *RCPA II* is reprinted in the appendix hereto at App. 147-148.

JURISDICTION

The Opinion of the Seventh Circuit Court of Appeals was entered February 13, 1996. Petitioner's timely request for rehearing was denied April 4, 1996.

Jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

The Jurisdiction of the district court was based on 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights claims), asserting deprivation under the Due Process, Equal Protection, and Contract Clauses of the United States Constitution, and upon 28 U.S.C. § 1367 (supplemental jurisdiction) for the pendant state law claims of Illinois Constitutional protections, breach of contract, and breach of fiduciary duty.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. art. III, § 2, cl. 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the Untied States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, citizens or Subjects.

STATEMENT OF THE CASE

Petitioner, an association of retired policemen, filed a class action for all participants in the City's retiree healthcare program claiming entitlement to a lifetime healthcare program provided at a fixed rate by the City and subsidized by the four relevant City of Chicago annuity and benefit funds. Upon remand from the Seventh Circuit's reversal of the District Court's denial of associational standing as having been inappropriately judged by the class certification standards of Rule 23, App. 80-99, the District Court again rejected the association's associational standing to assert the healthcare claims for its members on the defendants' assertion that some of the members, certain widows who will for a time pay less

without the litigation, are arguably better off if the litigation were not successful and that one of the association's officers was also one of the police pension fund trustees who had voted in favor of an agreement which diminished or reduced the participants' vested benefits. App. 37-42.

Although the 100-year-old association's purposes and actions over a century were clearly pertinent to the benefit-protection goals of the litigation, the district court held the two matters constitute "profound" conflicts, which defeat the association's assertion that the interests it seeks to protect are germane to its purpose. *Id.* Thus the association failed the second prong—"germaneness"—of *Hunt*'s three-prong associational standing rule. *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 343 (1977).[1] The district court then held that the association had failed to show that these conflicts were overcome by authorization of its membership, and denied the association's Rule 59(e) motion to alter or amend (presenting the association president's testimony that the litigation had been authorized at a meeting of the members).

On appeal, the Seventh Circuit affirmed, holding that profound conflicts exist to defeat germaneness where an association seeks to directly sue some of its own members (not present here) or where the association's suit, if

---

[1] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

successful, "would cause a direct detriment to the interests *of some of its members* and the litigation was not properly authorized." App. 12. Acknowledging that at least one of the two matters each "present[ed] a new type of 'profound' conflict," the court found an unavoidable conflict in asserting claims against the pension trustees, unless the RCPA had validly authorized the litigation. But then the Court held that the uncontroverted testimony of the association's president, that it had validly authorized the litigation, was insufficient as a matter of law to establish valid authorization because it did not prove that a quorum was present at the meeting approving litigation.[2] App. 19-21.

REASONS FOR GRANTING THE WRIT

Associational standing is the means by which a vast array of rights are asserted in the federal courts and the Seventh Circuit's view of the *Hunt* germaneness test as a rigorous device to intrude into the association's inner workings squarely conflicts with the position of the other Circuits that have addressed the germaneness test. It also erects a device for defendants to defeat associational standing by merely asserting that some of the association's members may be opposed to the litigation's purpose.

---

[2] This is especially troubling since the issue of whether a quorum was present did not arise in the case until the Seventh Circuit's opinion. In essence, the Court raised and validated a new objection on behalf of the defendants, upon which it then affirmed the dismissal.

As this court explained, in *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, ___ U.S. ___, 116 S.Ct. 1529 (May 13, 1996), associational standing has its roots in the civil rights cases of *NAACP v. Alabama*, 357 U.S. 449, 459 (1958), and its progeny. Associational standing was first squarely recognized in *Warth v. Seldin*, 422 U.S. 490 (1975). It then had its requirements elaborated in the three-prong test of *Hunt*, 432 U.S. at 343; and was first applied in worker benefits' cases in *Automobile Workers v. Brock*, 477 U.S. 274 (1986) (upholding union standing to challenge agency's construction of statute providing benefits to workers who lost their jobs because of competition from imports.). Justice Souter's opinion for a unanimous court in *Brown Group*, only this past May, established that the third prong—lack of need for individual participation to prove the claim or obtain the requested relief—is a rule of administrative convenience and efficiency for the court, not a constitutional requirement for an Article III case or controversy.

As, elucidated by a vast array of decisions, the germaneness test of *Hunt* is "undemanding" and requires only "mere pertinence between litigation subject and organizational purpose." *Humane Society of the United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988). This "*Hodel*" test has been followed, analyzed and confirmed by a host of decisions from that circuit[3] and

---

[3] *See, e.g., Albuquerque Indian Rights v. Lujan*, 930 F. 2d 49, 53 (D.C. Cir. 1991); *Competitive Enterprise Inst. v. Natl. Hwy. Traffic Safety Adm.*, 901 F.2d 107, 111 (D.C. Cir. 1990); *Hotel and Rest. Employees Union v. Smith*, 846 F.2d 1499, 1503 (continued...)

elsewhere.[4] Indeed, the sole purpose of the germaneness test is to weed out those "associations" who are nothing more than a shell to litigate a case from the genuine ongoing associations whose purpose is relevant to the subject matter of the litigation.[5]

---

[3] (...continued)
(D.C. Cir. 1988) (en banc decision); *Center for Auto Safety v. Thomas*, 847 F.2d 843, 849 (D.C. Cir. 1988) (en banc decision); *Washington Legal Fdn. v. Kessler*, 880 F. Supp. 26, 32 (D.D.C. 1995); and *National Assn. of Psychiatric Treatment Centers for Children v. Mendez*, 857 F. Supp. 85, 90 (D.D.C. 1994); *Freedom Republicans, Inc. v. Fed. Elec. Comm'n*, 788 F. Supp. 600, 602 (D.D.C. 1992).

[4] *Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83, 88-89 (3d Cir. 1991) (upholding germaneness to organization's purpose over assertion of member conflicts where defendants submitted nothing to show that approval violated association's internal rules); *Minnesota Fed. of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989) (teachers' association's organizational purpose insufficiently pertinent to tax challenge even though its members were possibly injured as taxpayers); and *Associated Gen. Contractors of Conn. v. City of New Haven*, 130 F.R.D. 4, 8-9 (D. Conn. 1990) (associational standing does not necessarily depend upon the harmony of member interest).

[5] *See McKinney v. United States Dept. of Treasury*, 799 F.2d 1544, 1553 (Fed. Cir. 1986) (insufficient nexus between organizational purpose of public interest law firm, as plaintiff, and the economic interests of the producers and workers it purports to represent); *Mountain States Legal Foundation v. Dole*, 655 F. Supp. 1424, 1427 ff. (D. Utah 1987); and *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979), all requiring "tight fit" of the litigation to the *organization*'s purposes; regardless that members may actually be injured in some way not germane to the organization's purpose for existing.

In contrast, the Seventh Circuit held that the defendant's mere assertion that some of the plaintiff association's members may be adversely affected by the outcome of the case puts the onus on the association to reveal, in detail, its internal decision to bring the litigation. This eliminates many of the benefits of associational standing. At best, it opens up the litigation to precisely the extended distraction away from the merits that occurred here (six years of litigation over whether the litigation may begin).[6] At worst, permitting a fishing expedition by the defendants, where no association member has asserted any objection, thwarts the assertion of rights by any interest groups, who are likely to have at least one member with a hypothetical adverse interest on the particular issue involved in the litigation. It also potentially infringes on association members' First Amendment rights. *See NAACP v. Alabama*, 357 U.S. 449.

---

[6] The district judge's denial of the intervention motions by individual participants prevented the case from proceeding ahead on the merits with an alternative plaintiff.

CONCLUSION

This case squarely presents a conflict of circuits over a matter of substantial constitutional importance: the meaning and significance of the germaneness prong to the *Hunt* test for associational standing and, in the broader sense, the proper role of associational plaintiffs.

Accordingly, the petitioners pray the Court grant their requested petition for certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
ROBERT J. STEIN III
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 2120
Chicago, Illinois 60601
(312) 606-0500
Attorneys for Petitioner